NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ANTHONY RUTLEDGE et al., Plaintiffs and Appellants, v. SEYFARTH, SHAW, FAIRWEATHER & GERALDSON et al., Defendants and Appellants.	A099423 (San Francisco County Super. Ct. No. 989163)

Anthony Rutledge, on his own behalf and on behalf of all other participants and beneficiaries of the Hotel Union and Hotel Industry of Hawaii Pension Trust and AFL Hotel and Restaurant Workers' Health and Welfare Trust Fund (collectively "Rutledge" and "Trust Funds," respectively) appeals after the trial court granted a motion for judgment of nonsuit filed by Seyfarth, Shaw, Fairweather & Geraldson, a law firm, and Mitchel Whitehead, one of its attorneys (collectively "Seyfarth"). This case arises from Seyfarth's alleged over-billing of attorney fees for Trust Fund-related legal work. On appeal, Rutledge contends the trial court (1) did not have jurisdiction to address whether Rutledge had standing to sue Seyfarth; (2) improperly concluded that Rutledge did not have standing; and (3) improperly concluded that Rutledge provided no evidence of damages. Rutledge also challenges the trial court's exclusion of certain evidence, its denial of Rutledge's motion to compel discovery, and its grant of discovery sanctions against Rutledge. In a "protective" cross-appeal, Seyfarth contends Rutledge's claims are barred under the doctrine of collateral estoppel and are preempted under ERISA. We conclude Rutledge did not have standing to bring the present action against Seyfarth and, therefore, shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On August 27, 1997, Rutledge, a former trustee for the Trust Funds, filed a class action complaint for damages against Seyfarth, alleging causes of action for breach of contract, breach of covenant of good faith, breach of fiduciary duty, fraud, constructive fraud, and negligent misrepresentation. The lawsuit was based on Seyfarth's alleged breach of an agreement—supposedly entered into in 1984—to charge $155 per hour for its legal work for the Trust Funds, and its subsequent efforts to hide the overcharges.

Seyfarth removed the action to federal district court on the ground that the district court's jurisdiction was exclusive under the Employment Retirement Income Security Act of 1974 (ERISA). (See 29 U.S.C. § 1144(a).) The district court remanded the action to state court and granted Rutledge $23,052.22 in attorney fees and costs as sanctions for improper removal. (See *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson* (9th Cir. 2000) 201 F.3d 1212, 1214-1215, amended on denial of rehearing, 208 F.3d 1170 (*Rutledge*).)[1] The Ninth Circuit Court of Appeals reversed the sanctions award on the ground that the legal determination on which the district court based its award of fees was erroneous in that removal *had* been proper because ERISA preempted the state action and gave the federal court exclusive jurisdiction over the claims. (*Rutledge*, *supra*, 201 F.3d at p. 1223.) The action remained in state court, however, because the remand order itself was not appealable. (*Id*. at p. 1215, citing 28 U.S.C. § 1447(d).)[2]

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[1] We grant Seyfarth's July 1, 2003 request for judicial notice of the Docket Report in *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, Case No. 97-CV-3633, filed in the United States District Court for the Northern District of California. (See *People v. Woodell* (1998) 17 Cal.4th 448, 458 [court records may be noticed under Evidence Code section 1280]; *Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 624, fn. 12 [granting request to take judicial notice of Insurance Commissioner's Web site].)

[2] In a "Supplemental Memorandum re Order of Nonsuit" (supplemental memorandum), filed after nonsuit was granted, the trial court noted that "[o]ne of the

On February 19, 1998, the trial court denied Seyfarth's motion for judgment on the pleadings and request for a stay.[3]

On March 28, 2000, the trial court denied Seyfarth's motion for summary judgment, which had been based on alleged ERISA preemption and collateral estoppel, and, on June 28, 2000, this court summarily denied Seyfarth's petition for writ of mandate to direct the trial court to grant the motion.

On May 22, 2000, Rutledge filed a first amended complaint, adding causes of action for negligence and an ERISA violation. On September 15, 2000, the trial court sustained Seyfarth's demurrer to the first amended complaint as to the ERISA cause of action, but otherwise overruled it.

On March 7, 2002, the trial court again denied Seyfarth's motion for summary judgment, which had been premised on the fact that the Ninth Circuit's opinion was now final and which added the ground that Seyfarth could not defend itself without disclosing privileged communications.

Also on March 7, 2002, Seyfarth filed a motion for judgment on the pleadings or for a judgment of nonsuit, based on Rutledge's alleged lack of standing and damages.

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underlying issues in this lawsuit has always been the notion of federal preemption because the Pension Trusts in this case operate under the ERISA statutes. While not engaging in a legal discussion of this issue at this time, the issue of preemption has been raised by [Seyfarth]. This Court understands a 'companion' case involving these facts is pending in the federal district court in Hawaii. The pleadings allege a breach of fiduciary duty by the Pension Fund Trust and its Trustees, with the same plaintiff suing as a beneficiary under the Trust. . . . Additionally, while Judge Vaughn Walker of the Northern District of California denied [Seyfarth's] motion to remove this case from state court to federal court, the Ninth Circuit, in order to address sanctions imposed by Judge Walker on [Seyfarth], made a very thorough analysis of ERISA's application to this very case. The Circuit opinion concluded that the state law claims were preempted by ERISA, that ERISA's civil enforcement provisions provided a cause of action for claims of excessive compensation. . . . [The Ninth Circuit's] discussion [of preemption] had no effect on the nonsuit motion, but it does suggest a preemption issue always existed in this case."

[3] Seyfarth had requested that the matter be stayed until a related action—involving a counterclaim Rutledge had filed in an ERISA action in Hawaii—was resolved.

Jury trial began on May 22, 2002.

Following a June 4, 2002 hearing on Seyfarth's motion for judgment of nonsuit, at which the trial court granted the motion, the trial court filed its supplemental memorandum on June 6, 2002, to further explain its nonsuit ruling. On June 12, 2002, the trial court entered an order granting the motion for judgment of nonsuit. On June 18, 2002, the trial court entered its judgment of nonsuit.

On July 3, 2002, Rutledge filed a notice of appeal.

On July 17, 2002, Seyfarth filed a notice of cross-appeal.

DISCUSSION

I. *The Trial Court's Jurisdiction to Grant Nonsuit on the Standing Issue*

Relying on Code of Civil Procedure section 1008,[4] Rutledge contends the trial court did not have jurisdiction to grant Seyfarth's motion for judgment of nonsuit on the issue of standing because a different judge had previously denied Seyfarth's motion for judgment on the pleadings on the same issue. (See § 1008 [limiting trial court's jurisdiction to reconsider, modify, amend, or revoke a prior order]; *Morite of California v. Superior Court* (1993) 19 Cal.App.4th 485, 492-493 [trial court could not avoid

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[4] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Section 1008, subdivision (a), provides: "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." Section 1008, subdivision (e), further provides that the statute "specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section."

jurisdictional requirements of section 1008 by simply setting matter for trial, thereby implicitly ignoring predecessor judge's interim stay order].) We find, however, that section 1008 is not implicated in the present case, in which the court ruled on two different motions, with distinct rules and burdens, at two different points in the litigation. (See *Pena v. W.H. Douthitt Steel & Supply Co.* (1986) 179 Cal.App.3d 924, 928-929 [reversing trial court's grant of defendants' summary judgment motion, but observing that if plaintiff "makes no better showing at trial, [defendants] will undoubtedly be entitled to a judgment of nonsuit. [Citation.] But at the summary judgment stage, the rule [regarding burden of proof] is different"].)

In *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 205 (*Community Memorial Hospital*), the appellate court rejected an argument similar to the one presented here, explaining that "a motion for summary judgment or adjudication is not a reconsideration of a motion overruling a demurrer. They are two different motions. To hold that a trial court is prevented in a motion for summary judgment or adjudication from revisiting issues of law raised on demurrer is to condemn the parties to trial even where the trial court's decision on demurrer was patently wrong. The result would be a waste of judicial resources, the very evil . . . section 1008 was intended to avoid."

The appellate court in *Community Memorial Hospital*, stated that, to the extent *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494 (*Gilberd*)—an opinion by a panel of this Division—"may be read to the contrary, we decline to follow it." *(Community Memorial Hospital*, *supra*, 50 Cal.App.4th at p. 205.) In *Gilberd*, we held that the trial court had improperly granted the respondent's demurrer, where the demurrer consisted solely of an incorporation of the respondent's prior summary judgment motion, which had been denied as moot. "The demurrer, therefore, again sought the trial court's consideration of issues previously and expressly determined adversely to respondent by the trial court. As such, the demurrer was simply part and parcel of respondent's unauthorized motion for reconsideration." (*Gilberd*, at p. 1502.) Later, in *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 685-686, we observed that *Gilberd* had merely clarified existing law (i.e., that section 1008 governs reconsideration of trial court orders and is the exclusive means for modifying, amending, or revoking an order), "and its key holding has remained uncontroverted since then (see *Community Memorial Hospital* [, *supra*, 50 Cal.App.4th at p. 205] [disputing only any implication in *Gilberd* that motions for summary judgment or adjudication, following an overruled demurrer, are subject to section 1008].)"

As implied in *Garcia v. Hejmadi*, the holding in *Gilberd* was not intended to preclude the trial court from deciding an issue raised in a motion that may have been initially addressed in an earlier, distinct motion at a different stage of the litigation. (See *Community Memorial Hospital*, *supra*, 50 Cal.App.4th at p. 205; accord, *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 283-285 [section 1008 did not preclude trial court's grant of judgment of nonsuit on ground of res judicata even though court had previously overruled a demurrer and denied a motion for summary judgment on same ground].)

In the present case, in February 1998, the trial court (Hon. David Garcia) denied a motion for judgment on the pleadings. Then, in June 2002, more than four years later, after Rutledge had presented his evidence at trial, the court (Hon. Robert Dondero) granted a motion for judgment of nonsuit.[5] A motion for judgment on the pleadings, like a demurrer, merely avers that the complaint does not state a cause of action. (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259-260.) On the other hand, a defendant is entitled to a judgment of nonsuit if the evidence presented at trial is insufficient as a matter of law to permit a jury to find in the plaintiff's favor. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291; *Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541.)

While both motions involved whether Rutledge had standing to sue Seyfarth, the motion for judgment on the pleadings alleged, inter alia, that Rutledge had not stated a

[5] Seyfarth had moved for judgment on the pleadings *or* for a judgment of nonsuit, but the trial court addressed only the motion for judgment of nonsuit.

claim for breach of fiduciary duty by Seyfarth. Seyfarth argued and the court granted the motion for judgment of nonsuit on the ground, inter alia, that Rutledge's pleadings and evidence failed to allege or establish either of two exceptions to the rule that a beneficiary does not have standing to sue attorneys hired by trustees of a trust: (1) that the trustees negligently or wrongfully refused to sue Seyfarth to protect the trust or (2) that Seyfarth had actively participated in a breach of the trustees' fiduciary duties.

Thus, the two motions came at very different points in the litigation, were subject to distinct rules and burdens of proof, and in fact addressed slightly different questions. Accordingly, the court's grant of the motion for a judgment of nonsuit was not subject to the requirements of section 1008. (See *Community Memorial Hospital*, *supra*, 50 Cal.App.4th at p. 205; *Lucas v. County of Los Angeles*, *supra*, 47 Cal.App.4th at pp. 283-285; *Pena v. W.H. Douthitt Steel & Supply Co., supra*, 179 Cal.App.3d at pp. 928-929.)

II. *The Trial Court's Grant of Nonsuit Due to Lack of Standing*

A. *Standard of Review*

" 'A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor.' [Citation.] In determining the sufficiency of the evidence, the trial court must not weigh the evidence or consider the credibility of the witnesses. Instead, it must interpret all of the evidence most favorably to the plaintiff's case and most strongly against the defendant, and must resolve all presumptions, inferences, conflicts, and doubts in favor of the plaintiff. If the plaintiff's claim is not supported by substantial evidence, then the defendant is entitled to a judgment as a matter of law, justifying the nonsuit. [Citation.]

"Since motions for nonsuit raise issues of law [citation], we review the rulings de novo, employing the same standard which governs the trial court [citation]." (*Saunders v. Taylor*, *supra*, 42 Cal.App.4th at pp. 1541-1542, citing *Nally v. Grace Community Church*, *supra*, 47 Cal.3d at p. 291.)

B. *Trial Court Background*

After granting the motion for judgment of nonsuit, the trial court explained its reasoning in a supplemental memorandum. With respect to the standing question, the court stated: "In presenting his proof, besides not alleging affirmative misconduct by the Pension Funds [i.e., the trustees], [Rutledge] did not establish the Pension Funds engaged in a pattern of conduct designed to harm the beneficiaries. Nor did [Rutledge] establish any proof of assistance by the defendant in any improper conduct. Lacking evidence of any sort the Pension Funds engaged in self-dealing against the interests of the beneficiaries and participants, [Rutledge] falls not only with his deficient pleadings but also in his evidence presented or simply proffered at trial."

C. *Analysis*

An attorney-client relationship normally is essential to the existence of an attorney's duty toward others. With respect to trusts, the general rule is that " '[t]he attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust. The attorney represents only the trustee.' [Citations.]" (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 212 (*Wells Fargo*).)[6]

Given that the trustee's attorney generally does not have a duty to beneficiaries of a trust, statutory and case law have established that beneficiaries normally do not have standing to sue the attorney. Section 367 provides that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." Section 369, subdivision (a)(2), provides that the trustee of an express trust may

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[6] Rutledge cites *In re Grand Jury Proceedings Grand Jury No. 97-11-8* (9th Cir. 1998) 162 F.3d 554, 556, which both parties acknowledge involved a criminal investigation of fraud by an unnamed union trustee for the Trust Funds, and in which the Ninth Circuit Court of Appeals stated: "When an attorney advises an ERISA trustee regarding the management of the fund, the ultimate clients of the attorney are as much the beneficiaries of the plan as the trustees." He neglects to mention, however, that our Supreme Court in *Wells Fargo*, *supra*, 22 Cal.4th 201 specifically rejected the Ninth Circuit's suggestion that the trustee is not the real client, holding that it "directly contradicts California law." (*Id.* at p. 208.)

sue "without joining as parties the persons for whose benefit the action is prosecuted . . . ." Hence, when an action is brought on behalf of an express trust, the trustee is the real party in interest. Conversely, the beneficiary of the trust, having no legal title or ownership interests in the trust assets, is not a real party in interest and may not sue in the name of the trust. (*Wolf v. Mitchell, Silberberg & Knupp* (1999) 76 Cal.App.4th 1030, 1036 (*Wolf*); *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 461-462 (*City of Atascadero*); *Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 753 (*Pillsbury*); *Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419, 427 (*Saks*).) " '[A]bsent special circumstances, an action prosecuted for the benefit of a trust estate by a person other than the trustee is not brought in the name of a real party in interest and is demurrable.' [Citation.]" (*Saks*, at p. 427.)[7]

There are exceptional circumstances in which a beneficiary may sue a third party, including an attorney for the trustee. "Thus, it is well established that where a trustee has committed a breach of trust, the trust beneficiaries may prosecute an action against third persons who, for their own financial gain or advantage, induced the trustee to commit the breach of trust; actively participated with, aided or abetted the trustee in that breach; or received and retained trust property from the trustee in knowing breach of trust. [Citation.]" (*City of Atascadero*, *supra*, 68 Cal.App.4th at p. 462; accord, *Harnedy v. Whitty* (2003) 110 Cal.App.4th 1333, 1340-1341 (*Harnedy*); *Pillsbury*, *supra*, 22 Cal.App.4th at p. 754; *Saks*, *supra*, 7 Cal.App.4th at pp. 427-428.)[8] The rationale for

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[7] Rutledge argues that Seyfarth represented the *trust*, not the trustees, and that, therefore, the trust beneficiaries had standing to sue Seyfarth on behalf of the trust. An express trust, however, is not an entity separate from its trustees and, for that reason, "the trustee, rather than the trust, is the real party in interest in litigation involving trust property." (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1132, fn. 3; see also *Pillsbury*, *supra*, 22 Cal.App.4th at p. 753; § 369, subd. (a)(2).)

[8] The *City of Atascadero* court further explained: "The rights of trust beneficiaries vis-à-vis third parties who participate in a breach of trust ultimately derive from the obligations of the trustee himself. The violation by a trustee of any duty owed to the beneficiaries of the trust constitutes a breach of the trust. [Citation.] Such duties include the duty of loyalty, the duty to avoid conflicts of interest, the duty to preserve trust

the rule that a beneficiary may bring an action against a third party to recover property transferred to that party by the trustee in breach of trust is that, " 'because the trustee has already committed a breach of trust in making the transfer, it is unnecessary for the beneficiaries to call on him to undo what he has done.' [Citations.]" (*Wolf*, *supra*, 76 Cal.App.4th at p. 1038.)

In *Saks*, two beneficiaries of a testamentary trust sued an attorney and real estate broker employed by the trustee. The complaint alleged negligence, breach of contract, and breach of fiduciary duty on the part of the third party defendants, all of which allegedly resulted in a decrease of the trust assets. The complaint further alleged that the trustee had refused to bring an action against the third parties despite plaintiffs' having demanded that it do so, and that the trustee had a conflict of interest that prevented it from bringing the action. (*Saks, supra,* 7 Cal.App.4th at p. 426.) Division Three of this District affirmed the trial court's sustaining of a demurrer to the plaintiffs' second amended complaint without leave to amend on the ground that, under both the Probate Code and the common law, the only real party in interest with respect to claims for enforcement of the provisions of an express trust is the trustee itself, not a beneficiary. (*Id*. at pp. 426-430.)

In *Pillsbury*, the beneficiary of an express trust sued third parties alleging that they had maliciously prosecuted a lawsuit against the trust. The beneficiary alleged that the trustee had failed and refused to bring the malicious prosecution action on behalf of the trust. (*Pillsbury, supra*, 22 Cal.App.4th at pp. 749-752.) The appellate court, relying on *Saks*, affirmed the trial court's judgment of nonsuit for lack of standing due to failure to

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property, the duty to make trust property productive, the duty to dispose of improper investments, and the duty to report and account. [Citations.] The standard of care with respect to trust investments is the 'prudent investor' rule. [Citations.] The beneficiaries of a trust may sue a trustee to recover profits or recoup losses resulting from a trustee's breach of any of these duties. [Citations.]" (*City of Atascadero, supra,* 68 Cal.App.4th at pp. 462-463.)

show that the trustee's failure to bring the malicious prosecution action on behalf of the trust was "negligent, wrongful or otherwise improper." (*Id.* at p. 756.)

In *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1105-1106, on the other hand, the beneficiaries alleged in their complaint that third party investment advisors and attorneys who represented the trustees concealed the trustees' breaches of trust, made misrepresentations to the court, and acted for their own personal gain in the form of fees and investment opportunities. The appellate court reversed the trial court's sustaining of a demurrer without leave to amend, concluding that the allegations demonstrated that the investment advisors and attorneys were accused of active participation in breaches of trust by the former trustees. (*Id*. at p. 1106.)

In *City of Atascadero*, the beneficiaries alleged in their complaint that a third party brokerage firm made direct misrepresentations to the beneficiaries, actively participated with the trustee in breaches of trust, and acted for their own financial gain. (*City of Atascadero, supra,* 68 Cal.App.4th at pp. 457-458, 462.) Division Four of this District reversed the trial court's sustaining of a demurrer without leave to amend, finding that such allegations satisfied the exception to the general rule that only the trustees have standing to sue a third party. (*Id*. at pp. 462-463.)

In *Wolf*, the trust beneficiary alleged in his complaint, inter alia, that the third party attorneys performed legal services intended to prevent the beneficiary from discovering dissipation of trust assets and the trustee's inappropriate investments. (*Wolf, supra,* 76 Cal.App.4th at p. 1040.) The appellate court held that these allegations met the requirements for a claim by a beneficiary directly against a third party who participated in a trustee's breach of trust. (*Ibid*.)

In *Harnedy*, the beneficiary sued a trustee of his father's trust for fraud, constructive fraud, and financial abuse. (*Harnedy*, *supra*, 110 Cal.App.4th at p. 1337.) A panel of this Division held that the beneficiary had standing to sue in that, inter alia, the complaint was brought against a current trustee "for what was effectively an alleged breach of trust." (*Id.* at p. 1342.) We further explained that the several holdings in *Saks*, *Pillsbury*, *Pierce v. Lyman*, *City of Atascadero*, and *Wolf* could "be rationalized relatively easily: when the claim being asserted rests in whole or in part on alleged breaches of trust by the trustee, a beneficiary has standing to pursue such a claim against either (1) the trustee directly, (2) the trustee *and* third parties participating in or benefiting from his, her or its breach of trust, or (3) such third parties alone. *Only* in circumstances such as those present in *Saks* and *Pillsbury*, where no misfeasance or breach of trust by the trustee is asserted and the beneficiary is effectively seeking to step into the shoes of the trustee and enforce the trust agreement directly, does the beneficiary lack standing." (*Harnedy*, *supra*, 110 Cal.App.4th at pp. 1341-1342, fn. omitted.)

In the present case, Rutledge asserts that he did not have to allege Seyfarth's active participation in the trustees' breach of trust, but merely had to state that there was a breach of trust and that Seyfarth received and retained trust property. Rutledge claims that he stated as much in paragraph 45 of the first amended complaint—a paragraph in the negligence cause of action—which states: "Defendants and each of them were negligent in the performance of their legal duties in that they neglected to advise Plaintiffs and the Class as to actions that were in the Plaintiffs' and the Class's best interests and instead, advised Plaintiffs and the Class in a way that would harm (or would not be advantageous to) Plaintiffs and the Class's interests and would tend to favor management's interests. Defendant did so by taking actions to subvert Plaintiffs' efforts to retain a new investment monitor for the Pension Plan, by blocking explanation and review of Defendants' own legal bills and the basis for their legal fees, by hiding their conflict of interest in purporting to represent Plaintiffs when, in fact, they were giving advice to management which was contrary to Plaintiffs' interests, and by advising management to vote against Plaintiffs' and the Class's proposals in order to create 'deadlocks' so the matter would be submitted to arbitration rather than being decided through the courts."

Rutledge argues that paragraph 45 contains allegations that Seyfarth "did receive excess fees and that management was acting contrary to the interests of the beneficiaries in order to further [Seyfarth's] own interests over the interests of the class." The allegations in paragraph 45 regarding Seyfarth's alleged misconduct plainly do not even come close to a claim that "management was acting contrary to the interests of the beneficiaries," or that the trustees breached their fiduciary duty by paying Seyfarth more than $155 per hour and failing to sue to recover the overpayments. Instead, the allegations imply that Seyfarth attempted to mislead and influence the trustees. (See *Wolf*, *supra*, 76 Cal.App.4th at pp. 1037-1038.) Unlike each of the cases we have discussed in which the appellate court found that the beneficiary had standing to sue the third party defendant (or the trustee himself), the complaint in this case did not contain a single allegation of wrongdoing on the part of the trustees. (Compare *Pierce v. Lyman*, *supra*, 1 Cal.App.4th at pp. 1105-1106; *City of Atascadero*, *supra*, 68 Cal.App.4th at pp. 457-458, 462-463; *Wolf*, *supra*, 76 Cal.App.4th at p. 1040.)

With respect to the trustees' failure to bring their own action against Seyfarth, Rutledge further asserts that the complaint and evidence at trial establish that the trustees' refusal to sue Seyfarth for the alleged overpayments constituted a breach of trust. In *Wolf*, the appellate court explained that "California has adopted the rule of the Restatement Second of Trusts, section 282, subdivision (2), which states that '[i]f the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person.' [Citations.] *Pillsbury* adopts the clarification of the scope of such a lawsuit described in comment e to subdivision (2) of section 282: 'If the trustee does not commit a breach of trust in failing to bring an action against the third person, as for example where it is prudent under the circumstances to refrain from bringing an action . . . the beneficiary cannot maintain a suit against the trustee and the third person.' (Rest.2d Trusts, § 282, subd. (2), com. e, p. 46, quoted with approval in *Pillsbury*, *supra*, 22 Cal.App.4th at p. 754, fn. 10.)" (*Wolf*, *supra*, 76 Cal.App.4th at pp. 1037-1038.) The *Wolf* court further observed that the beneficiary in that case, who was also a cotrustee, had neither joined his cotrustee in the lawsuit nor alleged that the cotrustee had committed a breach of trust in failing to sue the third party attorneys. Therefore, the beneficiary could not "take advantage of the exception to the general rule against trust beneficiaries' standing defined in *Saks*, *Pillsbury*, and section 282, subdivision (2), of the Restatement Second of Trusts." (*Wolf*, at p. 1038.)[9]

Likewise, in the present case, Rutledge never alleged—paragraph 45 of the first amended complaint notwithstanding—that the trustees committed a breach of trust by paying Seyfarth more than $155 per hour or by failing to sue Seyfarth to recover the overpayments. Nor did Rutledge's trial testimony provide evidence of any such breach, even under the generous standard utilized to determine the sufficiency of the evidence in ruling on a motion for nonsuit. (See *Saunders v. Taylor*, *supra*, 42 Cal.App.4th at pp. 1541-1542.) The only testimony cited by Rutledge that arguably shows trustee misconduct—that a Seyfarth attorney told him that a now-deceased trustee knew of and approved the yearly rate increases—was essentially hearsay, did not demonstrate a knowing breach of trust, and was thus insufficient to withstand the grant of nonsuit. In addition, while Rutledge testified that the employer trustees did not go along with his efforts to recover fees over $155 per hour paid to Seyfarth, he provided absolutely no evidence that their inaction constituted a breach of trust or that it was not "prudent under the circumstances to refrain from bringing an action." (*Wolf*, *supra*, 76 Cal.App.4th at pp. 1037-1038.) Consequently, Rutledge cannot satisfy the exception to the general rule that trust beneficiaries do not have standing to sue third parties. (See *ibid*.)

We therefore find that, in the present case, as in *Saks* and *Pillsbury*, Rutledge failed to allege in his complaint or provide evidence at trial regarding any breach of fiduciary duty, or wrongdoing whatsoever, on the part of the trustees.

In his reply brief, Rutledge discusses the policy of construing pleadings liberally in favor of the plaintiff and asserts that that policy should apply here. "Although the complaint may not be a model pleading, the policy of the law is to construe pleadings liberally to the end that cases will be tried on their merits rather than disposed of on

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[9] In *Wolf*, as already discussed, the appellate court found the beneficiary had standing based on a different exception to the general rule against suits brought by trust beneficiaries: where the third party has actively participated with the trustee in a breach of trust. (*Wolf, supra,* 76 Cal.App.4th at p. 1038.)

technicalities of pleadings. [Citations.] Mistaken labels and confusion of legal theory are not fatal; if appellant's complaint states a cause of action on any theory, he is entitled to introduce evidence thereon. [Citations.] An action cannot be defeated merely because it is not properly named." (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 833.)

Also in his reply brief, Rutledge asserts that the trial court and Seyfarth were aware that Rutledge brought this action because the trustees breached their fiduciary duty by failing to seek to recover Seyfarth's overcharges, given Rutledge's trial testimony and the fact that a lawsuit with counterclaims alleging such a breach was pending in Hawaii. (See §§ 469-471.) Thus, according to Rutledge, the trial court and Seyfarth "had judicial notice and were aware of Rutledge's assertions that the management trustees breached their duties in not seeking to recover overpayments." (See *Colvig v. RKO General, Inc.* (1965) 232 Cal.App.2d 56, 63 ["[I]n considering the sufficiency of the complaint, the trial court was not restricted to the matters appearing on the face of the complaint, but was entitled to read into it all matters of which it took judicial notice"].)

Rutledge failed to raise these points in his opening brief and therefore has waived them on appeal. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

Moreover, it is settled that "[t]he allowance or disallowance of amendments to pleadings during the course of the trial rests largely in the discretion of the trial court [citation] and its ruling will not be disturbed unless it clearly appears that such discretion has been abused. [Citation.] The trial court has a wide discretion in such matters where the purpose of the amendment is to raise new issues after the pleadings have been settled and the trial has commenced. [Citation.]" (*Feykert v. Hardy* (1963) 213 Cal.App.2d 67, 75.) A trial court does not abuse its discretion when it denies leave to amend based on the plaintiff's unexplained delay in requesting leave. (*City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1564 ["A party who waits 18 months before attempting to amend, and then does so only after trial has commenced, and who offers no excuse for the failure, can hardly complain when the request to amend is denied"].)

Here, the record reflects both repeated pretrial warnings by the trial court that the pleadings appeared to be deficient for purposes of standing to sue and Rutledge's repeated failure to amend the pleadings to allege a breach of trust by the trustees. For example, at a hearing on March 12, 2002, the court responded to Rutledge's counsel's question regarding whether Rutledge was foreclosed from seeking to amend the complaint, stating, "You do what you have to do. You make your motion. Whatever they challenge, we'll deal with it." Then at an April 4, 2002 hearing, the court expressed concern about Rutledge's insistence that the court take judicial notice of the Hawaii pleadings, asking, "Why, in the four and a half years [since this action was filed], have you not alleged anything regarding the trustee situation in your causes of action here . . . ?" The court added, "I, frankly, don't understand why the complaint doesn't allege some of these theories that are articulated in the cases that you rely upon so strongly."

When Rutledge's counsel again suggested amending the complaint, the trial court said, "I thought you mentioned you were thinking of doing that when we last were together, but I guess you didn't." Counsel responded, "Then that slipped my mind." Even though this interaction occurred weeks before trial began, Rutledge still did not move to amend the complaint and, in fact, on April 8, 2002, filed a memorandum that stated, "[p]laintiffs stand on their pleadings." Finally, on May 29, 2002, in the midst of trial, the trial court told Rutledge: "So that there's no question, I have offered during the months this case has been pending the issue of amendment of the complaint, okay? You have repeatedly told this Court you're satisfied with the pleading." And again, "[Y]ou've said in . . . your responses to the Court on several occasions on the standing question that you're satisfied with the pleadings as they are presented."

It was not until the June 4, 2002 hearing on Seyfarth's motion for nonsuit that Rutledge belatedly requested such leave to amend the complaint, to allege a conspiracy between Seyfarth and the trustees. At that point, he had neither offered evidence of a conspiracy at trial, nor made an offer of proof as to what evidence he could present regarding a conspiracy. The trial court plainly acted within its discretion when it refused to permit amendment of the complaint at such a late date. (See *City of Stanton v. Cox*, *supra*, 207 Cal.App.3d at p. 1564; *Feykert v. Hardy*, *supra*, 213 Cal.App.2d at p. 75.)

At the hearing on the nonsuit motion, the court summarized the question before it: "What this Court has to decide is the question of whether or not this particular pleading merits going forward beyond where it is at the present stage. And this Court has had, on innumerable occasions, suggested to the plaintiff the concern it had regarding the pleadings. And the plaintiffs' counsel chose, deliberately to essentially fall on his own sword by not taking up the Court's suggestion in any way to amend or deal with the issue with his pleadings. [¶] . . . [¶] An elementary review of the pleadings in this case indicates there is no allegation whatsoever, not a scintilla, to suggest that the plaintiff, the beneficiaries of these trusts, was, in any way, alleging that the trustees were involved in any kind of illegal or unlawful tortious behavior. That glaring omission on the part of the plaintiff, which has been persisted in maintaining, even with comments and discussions of these various legal cases, germane to the case, suggests a stubbornness that is to be reconciled, and as a consequence, the intentional decision on the part of Counsel to maintain this case in the posture that it is currently and has been pleaded in the courts of this county." The court concluded: "This case falls because the . . . plaintiff has failed to allege the illegal activity, the tortious activity of the trust or its trustees, and that is the central feature that's defective in this particular case."[10]

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[10] At oral argument, Rutledge argued, essentially, that the inadequacy of the pleadings should have been irrelevant to the trial court's nonsuit ruling, since a nonsuit involves the sufficiency of the evidence presented at trial, not the pleadings. We disagree.

First, the trial court concluded that both the pleadings *and the evidence* failed to show any breach of trust by the trustees, and, as already discussed, we agree with the court that the trial transcript does not contain sufficient evidence to allow a finding that Rutledge had standing to bring this action.

Second, Rutledge's ongoing refusal to amend the pleadings to allege misconduct by the trustees would have warranted a grant of nonsuit even before evidence was presented at trial, since any evidence of trustee misconduct would have gone beyond the allegations in the complaint. (Cf. *Lucas v. County of Los Angeles*, *supra*, 47 Cal.App.4th at pp. 284-285 [trial court's grant of nonsuit motion before presentation of case to jury, Furthermore, with respect to the assertion that the trial court should have taken judicial notice of the Hawaii action and extrapolated from that action a claim of breach of trust in the present action, Rutledge had previously defeated Seyfarth's request for a stay, after arguing that the claims in the present case are "totally different" than those involved in the Hawaii action, and that "[a] determination in the Hawaii arbitration will not decide any of the claims here." Rutledge cannot reasonably expect the trial court to presume that the claims raised in the Hawaii case were directly applicable to the present case after specifically advising the court to the contrary.[11] (Cf. *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943 [discussing doctrine of judicial estoppel, which " ' "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding" ' "].) Finally, as we have already discussed, *ante*, Rutledge's trial testimony did not even suggest that the trustees' failure to seek to recover Seyfarth's alleged overcharges constituted a breach of trust. Hence, had the pleadings been sufficient, Rutledge's evidence at trial was not.

Rutledge cites several cases involving bequests to support his additional assertion that, even without a claimed breach of trust, attorneys can be held liable to beneficiaries. (E.g., *Heyer v. Flaig* (1969) 70 Cal.2d 223, 226; *Lucas v. Hamm* (1961) 56 Cal.2d 583,

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"although irregular, was not procedurally improper," where, even if plaintiff's allegations were proved, they would not establish a cause of action].) Similarly, an amendment to conform to proof during trial would not have been appropriate, especially in light of Rutledge's stubborn refusal to amend the complaint before trial. (See *Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31 [" '[A]mendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend. [Citations.]' [Citations.]"].) Hence, the grant of nonsuit was proper in this case, based on the interplay between the pleadings and the evidence presented at trial.

[11] In its supplemental memorandum, the court noted that "[Rutledge] has sued the Pension Funds for breach of fiduciary duty in federal court in Hawaii. . . . It is also true [Rutledge] at the hearing on the motion for nonsuit requested this Court to follow Hawaiian law regarding standing. One wonders whether ERISA aspects of this case, and the issue of damages, triggered the trans-Pacific as well as federal/state features of these cases."

586-587; *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 660; *Garcia v. Borelli* (1982) 129 Cal.App.3d 24, 32.) Bequests, however, are a special category involving third-party beneficiary principles and special duties inapplicable to express trusts. (See, e.g., *Saks*, *supra*, 7 Cal.App.4th at pp. 430-431 ["The rules governing the respective rights of action of trustees and beneficiaries of express trusts are not the same as those generally applicable to promisees and third party beneficiaries. (4 Witkin, Cal. Procedure, Pleading [(3d ed. 1985)] § 117, at p. 153.)"].)

Rutledge also cites several cases involving either attorneys who did something to create a relationship with a non-client or other unique circumstances that justified departing from the general rule that an attorney has no duty to non-clients. For example, in *Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 Cal.App.3d 307 (*Morales*), a beneficiary of a trust sued the attorneys for the trustee for representing both the trustee and a third party dealing with the trust, a conflict of interest allegedly resulting in damage to the beneficiary's interests. Division Three of this District reversed the sustaining of a demurrer in favor of the attorneys, holding that "when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary." (*Id*. at p. 316.) The court concluded that the attorneys owed a duty to the beneficiary to disclose that they also represented the third party in question. (*Ibid.*)

While at first blush *Morales* might seem to support Rutledge's position, in *Johnson v. Superior Court* (1995) 38 Cal.App.4th 463, 473-474, the appellate court put *Morales* in perspective, stating: "The authorities since *Morales* . . . , while not directly taking exception to the rule of the case, appear to have held uniformly that the legal representation of a fiduciary, standing alone, does not impose upon the attorney a fiduciary obligation to the beneficiary. . . . [¶] We note further that facts existed in *Morales v. Field* suggestive of creation of a fiduciary duty to the beneficiary in addition to the mere existence of advice by an attorney to a fiduciary. The attorneys had communicated with the beneficiary stating that no further action on her part need be taken, that ' "we will keep you advised if anything unusual arises" ' and that ' "you should feel reasonably assured that your interests will be protected." ' [Citation.] Hence, there existed in *Morales* facts suggesting the undertaking of an obligation of care by the attorneys, apart from their representation of their direct client, the fiduciary."

In this case, on the other hand, Rutledge neither alleged nor offered evidence of Seyfarth's assumption of any special obligation toward him. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 394, 406 & fn. 16 [auditor's liability for negligent misrepresentation is limited to "the comparatively small group whom the defendant expects and intends to influence," and liability for general negligence "is confined to the client, i.e., the person who contracts for or engages the audit services" and perhaps other express third party beneficiaries].)

Finally, Rutledge contends that, despite any deficiencies in the complaint, because the trial court certified Rutledge's claims "as class action claims on behalf of the Pension and Health and Welfare Plans[, t]he class action notice governs the case."[12] (See *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932 (*Rose*).)

Assuming that Rutledge is arguing that the order certifying the class added new allegations or causes of action to this case, thereby superseding the allegations in the complaint, his argument must fail. First, *Rose*, *supra*, 126 Cal.App.3d 926, cited by Rutledge in support of his contention, says nothing of the kind. The *Rose* court did not address the relationship between a class certification order and the allegations in the complaint. Rather, the court merely stated that the defendant had misunderstood the requested scope of the class, explaining that the plaintiffs had narrowed the proposed class from all present and future recipients of pension benefits, as stated in the original

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[12] The notice of pendency of class action, filed on April 11, 2002, stated: "The class on whose behalf this action has been certified is: All participants and beneficiaries of the Hotel Union and Hotel Industry of Hawaii Pension Trust ('Pension Trust'); and all participants and beneficiaries of the AFL Hotel & Restaurant Workers' Health & Welfare Trust Fund ('Health & Welfare Fund') *on behalf of the Pension Trust and on behalf of the Health & Welfare Fund*." (Italics added.)

petition for writ of mandate, to all present recipients only, as stated in the subsequent motion for class certification. (*Id.* at p. 932.)

Furthermore, in the present case, the trial court explicitly informed the parties that the certification order did not amend the allegations of the pleadings. During the hearing on the class certification motion, Seyfarth argued that Rutledge was trying to change the character of the action by stating in the notice that the purpose of the suit was to replenish the trust corpus, contrary to the allegations of the complaint, which had requested individual damages for the class members. After some discussion, the trial court told Seyfarth's counsel: "Enough. We're trying the pleadings in this case, and your objection will be noted." Rutledge neither objected to the court's statement nor requested to amend the complaint.[13]

In the discussion in his brief about the effect of the class certification notice, Rutledge cites numerous irrelevant cases, including pension benefit cases that were certified as class actions in federal court under ERISA (e.g., *Amalgamated Clothing & Textile Workers v. Murdock* (9th Cir. 1988) 861 F.2d 1406, 1417-1419 [participants and beneficiaries of terminated plan had standing to sue on behalf of all participants and beneficiaries of plan for constructive trust remedy to strip ERISA fiduciary of ill-gotten profits earned from breach of fiduciary duties]), as well as numerous cases that were certified as class actions even though the named plaintiff did not have standing. (E.g., *Salton City etc. Owners Assn. v. M. Penn Phillips Co.* (1977) 75 Cal.App.3d 184, 187-189 [homeowners' association could bring action on behalf of class of association's members].) None of these cases, however, speak to the issue at hand: whether Rutledge

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[13] In its supplemental memorandum, the court further addressed this point, stating that "the Court's act of certification was to certify the class alleged by the plaintiff in his pleadings, and any contention that the Court magically changed the pleadings by granting certification is not consistent with the Court's understanding of what certification meant."

We also note that, even had the class action notice superseded the complaint (which it did not), the standing issue would have remained. An allegation that Rutledge was suing Seyfarth to replenish the trust funds would not have changed the fact that there was no allegation of a breach of trust by the trustees and, hence, no standing.

has standing in light of his failure to allege, or provide evidence of, any wrongdoing on the part of the trustees.

We conclude the trial court properly granted Seyfarth's motion for judgment of nonsuit on the ground that Rutledge lacked standing to sue.[14]

III. *The Trial Court's Exclusion of Evidence and Claims*

Rutledge contends the trial court committed reversible error when it excluded evidence at trial regarding Seyfarth's alleged attempts to block discovery of over-billing and efforts, with the assistance of attorneys at the firm of Van Bourg, Weinberg, Roger & Rosenfeld (Van Bourg),[15] to get the trustees to assert the attorney-client privilege so that evidence of Seyfarth's over-billing could not be presented. Rutledge also contends the trial court erred in granting Seyfarth's motion in limine to preclude evidence or argument that Seyfarth's failure to disclose its hours and hourly rate violated Business and Professions Code section 6148 which requires, inter alia, that all bills rendered by an attorney to a client "clearly state the basis thereof." (Bus. & Prof. Code, § 6148, subd. (b).)

Aside from the questionable substantive merit of these contentions, Rutledge has failed to show how this alleged exclusion of evidence and claims affected his ability to present evidence demonstrating that he had standing to sue Seyfarth. All of the alleged errors go to Rutledge's inability to present evidence regarding Seyfarth's over-billing and

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[14] Seyfarth also argues that the Taft-Hartley Act (29 U.S.C. § 141 et seq.) precludes a finding of standing in this case. Because we have concluded that Rutledge lacked standing based on other grounds decided by the trial court, we need not address this additional ground raised by Seyfarth. In addition, because we have found that Rutledge did not have standing to sue Seyfarth, we need not address the trial court's other basis for granting nonsuit: that Rutledge had not shown that he was damaged by Seyfarth's allegedly improper actions. For the same reason, we also need not address the issues raised in Seyfarth's cross-appeal: whether Rutledge's claims are (1) barred under the doctrine of collateral estoppel and (2) preempted under ERISA.

[15] Van Bourg was counsel for the trustees from 1986 to 2001. In its supplemental memorandum, the trial court observed that, at trial, Rutledge "sought to develop a theory

efforts to hide the over-billing. Such evidence thus related only to Seyfarth's wrongdoing and would not have supplied the missing evidence regarding misconduct by the trustees that could have averted the judgment of nonsuit due to lack of standing. Consequently, we need not address the merits of these contentions.

IV. *Trial Court's Denial of Rutledge's Second Discovery Motion and Imposition of Sanctions*

Finally, Rutledge contends the trial court wrongly denied his second motion to compel the appearance of Seyfarth attorney Mitchel Whitehead to answer questions at a deposition regarding his billing practices. Seyfarth had invoked the attorney-client privilege as to this line of questioning but, according to Rutledge, the privilege argument was "bogus" and, moreover, Seyfarth had waived any alleged privilege.

Rutledge also contends the trial court improperly imposed $2,950 in sanctions after Seyfarth filed a motion for a protective order and requested sanctions against Rutledge and his counsel, pursuant to sections 2023, subdivisions (a)(8) and (a)(9) and 2025, subdivision (i),[16] on the grounds that (1) Rutledge was trying to take discovery that

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of complicity between [Seyfarth] and the Van Bourg law firm without any notice in his pleadings to opposing counsel."

[16] Section 2023 provides in relevant part: "(a) Misuses of the discovery process include, but are not limited to, the following: [¶] . . . . [¶] (8) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery. [¶] (9) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that such an attempt has been made. Notwithstanding the outcome of the particular discovery motion, the court shall impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." (Section 2023 has been repealed, with an operative date of July 1, 2005. (Stats. 2004, ch. 182, § 22, p. 612.)

Section 2025, subdivision (i), provides: "Before, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order. The motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion."

the court had already ruled was barred by the attorney-client privilege and (2) Rutledge had failed to cooperate with Seyfarth's repeated efforts to confer regarding the subject of the motion. The trial court granted Seyfarth's motion for a protective order and awarded sanctions on the ground that Rutledge's opposition to the motion for a protective order was without substantial justification. (See § 2023, subd. (a)(8) [misuses of discovery process include "[m]aking or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery"].)

We need not decide the first question, regarding whether the trial court properly denied Rutledge's motion to compel because (1) as in part V, *ante*, of this opinion, Rutledge has not shown that the denial of this motion affected his ability to present evidence demonstrating that he had standing to sue Seyfarth, and (2) in light of the uncontroverted evidence that Rutledge failed to respond to three letters from Seyfarth regarding the subject of the motion and any alleged waiver of the attorney-client privilege by the trustees, the court's award of sanctions was mandatory under section 2023, subdivision (a)(9). (See § 2023, subd. (a)(9) ["Notwithstanding the outcome of the particular discovery motion, the court *shall* impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct"], italics added.)

Here, regardless of the merit of the underlying dispute—regarding Seyfarth's claim of attorney-client privilege—the trial court's imposition of sanctions was mandatory due to Rutledge's refusal to confer with Seyfarth, which led to the filing of the motion for a protective order. (See § 2023, subd. (a)(9).) There was no abuse of discretion. (See *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496.)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Seyfarth.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.